

Reservations Comments

Audubon of Florida

Background

Key to the passage of the Water Resources Development Act (WRDA) of 2000 was establishing mechanisms to ensure that the natural system would get its share of the water from implementation of the Comprehensive Everglades Restoration Plan (CERP). This concept is known as “assurances of project benefits” for the CERP and its projects. Central to this concept is the identification of the quantity, quality, timing and distribution of water needed for the natural system in the Project Implementation Report (PIR), and execution under State law of a reservation of water for the natural system prior to the execution of a project cooperation agreement (PCA). Also central to assurances provisions is the agreement between the President and the Governor that ensures water “shall not be permitted for consumptive uses or otherwise made unavailable by the state until such time as sufficient reservations of water for the restoration of the natural system are made under State law.” This must be done “in accordance with the project implementation report for that project consistent with the Plan.” Section 601(h)(2). There are several other checks and balances within WRDA that require reservations be established and these are tied to the documentation process. Finally, operations manuals must be consistent with reservations to ensure that once the infrastructure is built and a reservation is established for a project, the operation of that project delivers the reserved water to the natural system.

Reservations shall be completed through the already established state statutory framework. 373.223(4) states:

The governing board or the department, by regulation, may reserve from use by permit applicants, water in such locations and quantities, and for such seasons of the year, as in its judgment may be required for the protection of fish and wildlife or the public health and safety. Such reservations shall be subject to periodic review and revision in light of changed conditions. However, all presently existing legal uses of water shall be protected so long as such use is not contrary to the public interest.

Consumptive use permitting

The consumptive use permitting (CUP) process affords an opportunity to balance water withdrawals with protection of the resources. A three-prong test must be met to receive a consumptive use permit. The use must be “reasonable-beneficial”, it cannot interfere with any presently existing legal use of water, and it must be consistent with the public interest. Additionally, a permit must be consistent with the overall objectives of the District and not harmful to the water resources under Chapter 373. A recipient of a permit has the right to use water consistent with any conditions on the permit for the duration it is granted. After granting the permit, the recipient obtains the status of an “existing legal user”. This use is protected from the establishment of a reservation under § 373.223(4) and the use shall be protected as long as it meets the public interest test. WRDA uses the broader term “existing legal source” of water, as opposed to “existing legal use.”

Recommendation: The use of the broader term “existing legal source” versus that of “existing legal use”, found in state law, should be interpreted to include both the “existing legal use” of consumptive users, as well as the sources of water upon which natural resources are dependent.

MFLs and Water Shortage plan

Currently, there are many tools within state law that protect water resources and the natural systems that depend on them. One such tool is that of Minimum Flows and Levels (MFLs) found within § 373.042, F.S., which requires the establishment of the limit at which further withdrawals from a resource will be significantly harmful. This must be thought of a “floor” below which significant harm occurs to the resource. This is not a restorative standard. To date MFLs have been completed for Lake Okeechobee, the Everglades and the Northern Biscayne Aquifer. The statute also requires the development of prevention and recovery strategies for areas where MFLs cannot be met. These prevention and recovery strategies largely consist of CERP projects, yet to be constructed. (Cite language from 042 here). Other estuarine resources are the focus of upcoming MFL rulemaking efforts such as the St. Lucie River, the Caloosahatchee River, Biscayne Bay and Florida Bay. Currently rule development is proceeding on the Loxahatchee River MFL.

Water shortage declarations are promulgated under 373.246 to prevent serious harm to water resources, defined as long term, irreversible or permanent harm to a water resource. The various phases are used to declare different stages of water use cutbacks to prevent serious harm from occurring. The attempt is to “share the pain” of decreasing water supplies between users, as well as the environment.

Principles and Issues for the Pre-CERP Baseline

The starting point for determining how to make a reservation and what to base it on is found in establishing the Pre-CERP baseline. The need to develop a model of the 2000 existing condition to show how the system is operating and the quantity, quality, timing, and distribution of water it is delivering is grounded in state and federal law. The pre-CERP baseline will only be as accurate as the assumptions used to develop the model.

Recommendation: The SFWMD, the Corps and Interior should jointly establish timetables and processes to resolve conflicts over modeling assumptions for the pre-CERP baseline through an open and accessible public process.

Recommendation: The SFWMD and the Corps should update the conditions assumed for the 1999 Restudy and the 1995 base of the Lower East Coast Regional Water Supply Plan (LECRWSP) to reflect December 2000 conditions in order to establish a baseline.

Projects that were authorized, yet remain unconstructed should be included in the Pre-CERP baseline. The Savings Clause of WRDA only applies to changes in water sources as a result of implementation of the CERP. The Savings Clause does not apply to projects outside or authorized before CERP. On the issue of the maintenance of flood

protection, implementation of the CERP, shall not reduce levels of service for flood protection. Specifically, one condition (ii) states that the levels shall not be reduced beyond those in accordance with applicable law. Levels of service for flood protection must be consistent with those authorized by law.

Recommendation: Conditions that are the result of temporary, experimental and emergency operations, such as ISOP, should not be covered under the Savings Clause. Operations in accordance with applicable law should control.

The variable nature of operations in the Southern Everglades poses a problem for implementation of the Savings Clause for Everglades National Park. It is therefore appropriate that the pre-CERP baseline be updated for Savings Clause purposes once the Modified Water Deliveries and the C-111 Projects are completed.

Recommendation: The pre-CERP baseline should include, for Savings Clause purposes, conditions anticipated to result from the completion of Modified Water Deliveries and the C-111 Projects.

While it is logical to identify primary, secondary and tertiary sources of water, it is not logical to provide the same rights to each of those sources. For example, if a user is dependent on Lake Okeechobee under a 1 in 10-year drought scenario, what legal right, if any, should vest upon that source? This must be clearly resolved in order to accomplish the goals of the CERP. If not the restoration ecosystem and health of the resource will continue to be a secondary consideration. A user cannot lay the same legal claim to a source they are less dependent upon.

Generally permits allocate a quantity much larger than that actually needed, and used and using the amount the permit was actually allocated will tend to overestimate and legally vest a larger entitlement than that actually used. If more accurate methods of investing agricultural irrigation are being explored, it would only stand to reason that the most accurate system of accounting should be employed to calculate human use as of December 2000. The same should hold true for actual acreage planted versus permitted acreage. The most accurate calculation of use is that actually planted in the ground to estimate supplemental irrigation demand.

Recommendation: "Reasonable needs" identified on page 14, line 15 must refer to an amount actually used.

Changes to operational guidelines outside of CERP must be addressed. Vesting rights in quantities of water that shall be subject to change through non-rule efforts such as Supply Side Management sets up a potential future conflict. When Supply Side Management, a non-CERP initiative, is implemented during a drought and becomes the policy guiding operations during extreme events, user groups cannot use the Savings Clause to oppose operating the system in that way.

Recommendation: These operations guidelines should be formally adopted as rules, so

they actually become applicable law rather than a perceived consistency or inconsistency with the law.

In many instances, current deliveries to estuarine bodies such as Florida Bay and Biscayne Bay are based on flood protection needs for urban and agricultural areas, not the ecosystem needs. Some of these uses are not specifically “beneficial” for that water body, yet the quantity is delivered regardless. Beneficial deliveries must be defined, and the needs of the ecosystems, including estuaries, on which fish and wildlife depend, must be determined. It is possible that one aspect of a delivery, such as its quantity, may be beneficial to fish and wildlife, while other aspects, such as quality, timing, and distribution may not be. This is especially true for point-source discharges from urban canals into estuarine systems.

Recommendation: Deliveries for fish and wildlife must be based on the needs of the ecosystems upon which species depend.

Existing Legal Sources

The definition that is contained within the document for existing legal sources is on page 15. It states:

The quantity of water available from all locations of which there was a dependence as of December 2000, consistent with Federal and State law for: 1) urban and agricultural existing legal uses, including those uses exempt from permitting requirements; 2) non-consumptive uses, including regional surface water deliveries and groundwater seepage for resource protection; 3) meeting the entitlement of the Seminole Tribe of Florida; 4) the Miccosukee Tribe; 5) federal and state requirements for Everglades National Park; and 6) protection of fish and wildlife.

We agree with many stakeholders that the term dependence is vague. Would this include any dependence whatsoever, whether that source was a primary, secondary or tertiary source? If so, it would seem the scope of dependence has been radically expanded. This dependence must be based on a scientific standard, a period of record. We agree with alternatively offered language of other groups that the term “dependence” should be dropped from the definition and the quantity of water should be gauged by a reasonable-beneficial use or for the protection of fish and wildlife standard.

Recommendation: The definition of “existing legal source” should be amended as follows:

~~The quantity of water available from all locations of which there was a dependence as of~~ delivered by the C&SF project that was utilized for reasonable-beneficial uses or for protection of fish and wildlife as of December 2000, based on a 36 year period of record for rainfall, consistent with Federal and State law for: 1) urban and agricultural existing legal uses, including those uses exempt from permitting requirements; 2) non-consumptive uses, including regional surface water deliveries and groundwater seepage for resource protection; 3) meeting the entitlement of the Seminole Tribe of Florida; 4) the Miccosukee

Tribe; 5) federal and state requirements for Everglades National Park; and 6) protection of fish and wildlife.

Spatial Identification of Existing Legal Source User Basins

Recommendation: The Table on page 16 must include the estuarine resources. Biscayne Bay, Florida Bay, Loxahatchee River and Slough, St. Lucie estuary (as opposed to the agricultural basin), and Caloosahatchee (as opposed to agricultural basin), Lake Worth Lagoon must be included in the Environmental basins section.

Method for Quantifying Existing Legal Sources through the Pre-CERP Baseline

While a water budget should be completed for the existing legal source basins, without the full array of those basins included, the water budget will not capture all environmental demands. The exclusion of regulatory discharges is inappropriate since many estuarine areas, such as Biscayne Bay, rely heavily on regulatory discharges. The statement that regulatory discharges “have not been historically depended upon” is poor justification and confuses the issue. Since regulatory releases often result from undesirable patterns and variations in rainfall, it could be argued that rainfall is not a “dependable” source of water and should be excluded (as evidenced by the many periods of water shortages or flooding). If “dependability” is a factor to be considered when quantifying existing legal sources, a clear definition and method for determining dependability need to be provided. Further, the proposal to eliminate regulatory discharges as existing legal sources appears to conflict with statements in the introductory paragraph of this section. It states, “hydropatterns of the existing environmental systems are reflective of the operational policies currently in place for the region as defined by regulation schedules, conveyance limitations, water control structure hydraulics for flood protection, water supply and environmental deliveries.” This acknowledges that conditions in many natural areas result from operational policies – including regulatory discharges – which were in place as of December 2000. Accordingly, regulatory discharges should be included when quantifying existing legal sources, to the extent that they provided benefits to fish and wildlife.

Recommendation: Before regulatory discharges are completely dismissed, the benefits to receiving bodies must be included in the Environmental basins section. Any unintended but reasonable benefits should be included in this analysis.

Proposed Procedure for Identifying Impacts to the Existing Legal Sources through PIR Development

There two potential problems to be addressed during the PIR phase. The project may not meet its expected performance, or it may not make up for the quantity and quality of water transferred or eliminated. If the design is deemed unacceptable, a process must be established to develop further iterations of the design, including a range of alternatives and a peer review process. This process, however, is outside the scope of this document and should be developed by the RECOVER team. Finally, if there is an elimination or transfer, a revised existing legal source user basin volume probability curve must be used for subsequent PIRs.

Recommendation: The document should specify how this would be coordinated.

Quantification of Regional Water Availability for Water Supply Service Areas

We support the concept of Regional Water Availability (RWA). Defining existing allocations for consumptive use permitting and non-consumptive uses for resource protection will give a clearer picture upon which decisions are made to issue consumptive use permits. Basing the RWA rule upon the pre-CERP baseline will allow for better decision making on future permits. Updating the rule will provide for future clarity, as well in consumptive use permitting and issuance of renewals.

Recommendation: How the quantity determinations are made and conflicts resolved regarding the RWA (including existing and future demands for consumptive users), resource protection and environmental deliveries must be clearly determined, and should involve all of the agencies and stakeholders involved in the CERP through an open and accessible public process.

Recommendation: The relationship between the establishment of the RWA rule and the individual project reservations, building upon the pre-CERP reservation, should be clarified.

Implementation of RWA through Consumptive Use Permitting rules

While we agree with the establishment of an accounting procedure to be implemented through the permit application review process, some concerns exist about the current proposal of doing so. We applaud the accountability of such a permitting system. In addition, it is important that the use of alternative sources be a primary consideration to degree it would offset demands on the regional system.

Number 3 on page 20 states; “The object is to not exceed the volume in the rule.” This should not only be the object, but the standard. Audubon would not support exceeding the rule under any circumstances.

Recommendation: It should also be made clear that permits will not be issued conditioned on future projects.

Along these same lines on page 21, we agree that the RWA rule should define what actions are to be taken in the event that demands of a basin equal or exceed the volume of the regional water available to the basin by rule.

Recommendation: If issuance of a permit is likely to cause an exceedance of the volume in the rule, the permit must be denied. It will become difficult, but the rule will have to act as an absolute in some instances thus requiring the denial of a permit until projects come on line to make water available, such as additional CERP storage projects, and even then, only after the project is being operated consistent with the reservation for the natural system.

Establishing a Pre-CERP Reservation for the Environment

The development of a rainfall driven schedule pursuant to the Lower East Coast Regional Water Supply Plan is very important. This will improve the timing, flow and distribution of water for the enhancement and protection of fish, wildlife and habitat. We are concerned about the language on page 21, "existing legal source protection may constrain, to some extent, the full implementation of rainfall driven schedules as originally envisioned in the LEC plan". Nowhere can we find this constraint grounded in applicable federal or state law. Of further concern is the next sentence, stating "Based on the current definition of existing legal sources, these proposed rainfall driven volumes of water must not redistribute the volumes associated with other existing legal source user basins from which there was a dependence on December 2000, but may redistribute volumes identified for the natural systems". The final part of the sentence could be read to mean that the redistribution would only occur relevant to volumes for the natural system.

Recommendation: This redistribution should not be solely limited to only portions of the natural system. It could set up competing needs within the system itself. Also, no such constraint exists in the law. As permits expire, they must be reevaluated under the public interest test to ensure that the use is not contrary to that interest. Reservations fit within the state's authority to constrain the use of water from consumptive use permittees, but a similar constraint does not, nor should it, exist akin to curtailing the development of a rainfall driven schedule based on an existing legal source "entitlement".

Savings Clause protection is only applicable to the implementation of the CERP. Establishing a pre-CERP baseline is by definition, outside the CERP and cannot qualify for savings Clause, or existing legal source protection. The development of a rainfall driven schedule is not something mandated as a part of CERP implementation. It is an effort to better define timing, flow and distribution of water as a precursor to a pre-CERP reservation as contemplated by the LEC plan. Attaching Savings Clause protection to such an endeavor approaches the slippery slope of constraining the District's authority by applying the Savings Clause to situations that do not result in the loss of water from implementing the CERP.

Recommendation: The Savings Clause analysis should only be applied to implementation of the CERP. Running every District planning or modeling exercise through a Savings Clause analysis will unnecessarily restrict the state's authority.

We support the concept of Federal approval for the rainfall driven deliveries to protect fish and wildlife. Once Federal approval is achieved, the portion of the rainfall driven deliveries will be reserved from use through state rule. This is probably the most important and supported aspect of this reservations paper. It is critical for the natural system to receive some minimal level of legal protection similar to that of the various Tribal entitlements or legally permitted protection. This is a way to achieve some small level of parity for the natural system, which only currently is only entitled to protection from the result of implementation of the CERP through the Savings Clause. Additionally, establishment of a pre-CERP reservation for the natural system will be essential to effective application of the Savings Clause for the natural system. The

mechanism to protect against consumptive use permitting, and other permitting, found in § 373.223(4) should be employed to provide this base level of protection to protect fish and wildlife. It is logical that some sort of starting point be established as a precursor for reservations from projects to be implemented in the future. Without such basic protection, many natural system advocates will be forced into advocating for individual reservations to protect natural areas now because of increasing concern over availability of water and overallocations to permitted uses. A holistic approach to establishing a system-wide or regional pre-CERP reservations will be a significantly more efficient way to protect the natural system Audubon considers this to an important precursor to implementing a reservations process for CERP implementation.

Quantification of Additional Water for Natural Systems and Human Uses Made Available by CERP

We support of quantifying benefits on a system-wide basis as well as a project-by-project basis. In certain circumstances it may be appropriate to only identify benefits or water to be reserved for the natural system and the effects of that on a project-level basis, such as Southern Golden Gate Estates or the Loxahatchee River. This is the only way the true benefits will be able to be identified and quantified.

Problematic in this section though, contained within lines 40-42, is the variance of project performance after construction. The section states, “quantification and accounting of water needed to be reserved, as reflected in the PIR, could vary from the actual project performance after project construction and during the operation phase”. There is no real process defined on how to deal with the shortfall. If after the further iterations of design, described on page 18, lines 16-17, and optimization of operations, page 23, lines 1-2, the anticipated benefits are not achieved the natural system must still get the intended benefit of that project. Is there an across the board reduction in benefits to all recipients of water? Audubon would not support an approach that reduced the benefits to the natural system. While alternative water supplies can be developed to make up for shortfalls in urban and agricultural water supplies, this is not an option for the natural system.

Protection of Additional Water for Natural Systems and Human Uses Made Available by CERP

This section is important to the planning of an inevitability of CERP implementation, what if a project does not produce the anticipated amount of water it is supposed to produce? While it makes sense that the PIR address quantities of water for future human supply, this must not become equitable to the requirements in WRDA 2000, that a reservation be made for the natural system. § 601(4)(A)(iii)(V). Water supply performance measures are not the same level of protection to be afforded the natural system.

Only through actual operation of the facility, will we be able to gain enough knowledge to accurately base a reservations rule. Source shifting issues should also be resolved within the PIR stage, or when the reservations rule is crafted.

Of concern in this section, page 23, lines 28-36, changes between the PIR and final

operations “may affect the amount of water initially reserved by rule for the natural system”. This change may also affect water available for consumptive uses. The response to this uncertainty is that “the reservation should be conditioned upon reevaluating performance of the facility once constructed and operational”.

Recommendation: This disparity must be resolved, and priority must be given to restoration. Simply relying on the RECOVER and adaptive assessment processes to rectify these shortfalls is not sufficient.

Recommendation: We recognize that making an initial estimate of anticipated benefits of CERP may be necessary of planning purpose, however, such estimate should be based upon the “yellow book” estimates and the initial system-wide estimate of 80% of the water for natural systems and 20% for agricultural and urban water supply, or updated numbers from PIRs.

Relationship of Quantification of Water to be Reserved and Operating Manuals

Page 24, lines 41 through the top of page 25, addresses revising the reservations rule to reflect the difference between draft project operating manuals in the PIRs and the completed projects with operations. As with the previous section, while scheduling and performance differences may necessitate a revision to the reservations rule, there is no certainty or process attached to the revision in this paper.

Recommendation: Such a process should be developed with the involvement of all agencies involved in CERP, through an open public process, and must be consistent with the WRDA Act, the President/Governor Agreement, the Programmatic Regulations for the implementation of CERP, and the project cooperation agreement (PCA) for individual projects. Mechanisms to resolve conflicts over how to resolve these issues must be developed.